all on his contract. This is not surprising because quite conceivably there must be cases where contractors do not make a profit on some particular contracts. In the circumstances it would not be appropriate to allow the plaintiff's claim under this head.

Coming next to the claim on *quantum meruit*, I must say that the plaintiff's claim falls to be decided on this basis. As I have said before, *quantum meruit* is a remedy which is alternative to damages. The case for which it provides is where the party injured by a breach of contract has, at the time when the breach occurs, done part, but not all, of that which he is bound to do under the contract and is seeking to be recompensed for the value of what he has done. The case of *Planche* v. *Colburn, supra,* provides a useful illustration of the remedy. Perhaps I should mention that the plaintiff would also appear to be entitled to recover on *quantum meruit* on the doctrine of substantial performance, although I do not propose to rest my decision as regards *quantum meruit* entirely on this doctrine. The authority commonly cited for this proposition is the case of *H. Dakin & Co. Ltd.* v. *Lee* [8] in which it was decided that where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.

The plaintiff's evidence as to the amount he spent on performance of the contract up to the date on which it was cancelled by the defendant has not been challenged in any way. There will therefore be judgment for the plaintiff against the defendant in the sum of $4,079.98 with interest thereon at 6% per annum from the date of the judgment to the date of satisfaction and costs to be taxed.

Judgment for the plaintiff.

Solicitors: *Eugene Lye & Hoh; S. Sothi.*

SAMSUDIN v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Good and Hill JJ.A.) September 29, 1962]

[K.L. — F.M. Criminal Appeal No. 29 of 1962]

Criminal Law and Procedure — Murder trial — Special jury — Granting application for — Whether necessary for judge to record his reasons — Criminal Procedure Code (Cap. 21), s.190.

Criminal Law and Procedure — Statements made to police by witnesses — Failure to direct that defence be supplied with copies of the statements — Criminal Procedure Code (Cap. 21), s.124(2) — Policy behind subsection.

It is not necessary for the trial judge to record his reasons for granting an application for a special jury and the fact that he gave defence counsel an opportunity of stating whether he had any objection or not shows that he did direct his mind to the question whether he should grant the application or not. The fact that he did grant it after being told that defence counsel had no objection implies that he must have considered it just and reasonable to do so.

The policy behind the provisions of section 124(2) of the Criminal Procedure Code (Cap. 21) is that where a witness gives evidence in court which the prosecution knows or the defence either knows or suspects to be in conflict with a statement which he has previously made to the police, it is in the interests of justice that the judge should be made aware of the discrepancy so that the credibility of the witnesses may be tested by cross-examination, under which he will either explain, or fail to explain, the discrepancy to the satisfaction of the court. As, however, it is unlikely that the whole of a witness's testimony would be in conflict with the whole of his previous statement the subsection is usually invoked for the purpose of focussing attention on particular discrepancies.

Observations on providing defence with copies of statements made to the police.

Observations on discretion of prosecution to call or not to call material witnesses.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, C.A. at p. 109.

(2) *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* [1944] A.C. 156, 168.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

Harun M. Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Good J.A.: This appeal is against the appellant's conviction in the High Court at Penang for culpable homicide not amounting to murder contrary to section 304 of the Penal Code, and also against the sentence of seven years' imprisonment imposed upon him in respect of that conviction on the 5th July, 1962.

The incident as a result of which the appellant was charged occurred at about 10 p.m. on the 29th March, 1962 at the Swiss Hotel, Chulia Street, Penang, when a male Indian named Habib s/o Syed Ibrahim received a stab wound from which he died soon after being admitted to hospital. The appellant was charged with murder and tried by Hepworth J. and a special jury with the consequences already stated.

The incident occurred either inside a ground floor room of the hotel or outside the room in the courtyard. The only evidence of what took place was given by P.W.1 another male Indian who on the evening in question had been drinking with the deceased in a bar for some hours before going with the deceased to the hotel. The appellant made an unsworn statement from the dock and the jury had before them two different versions of what took place, one of which was given by P.W. 1 and the other by the appellant.

According to P.W. 1's story, on arriving at the hotel the deceased went upstairs to look for a girl named Inderani (D.W.3), who as it happened was not in the hotel at the time. P.W. 1

himself went into a ground-floor room occupied by the appellant and Inderani's mother Letchimi, where he found the appellant and Letchimi and another male Indian named Kalanjiam. There was some conversation of an unfriendly nature between Kalanjiam and P.W. 1 after which Kalanjiam made a signal to the appellant by a wink and an inclination of the head, whereupon the appellant got up and stabbed P.W. 1 a number of times. P.W. 1 shouted for his friend Habib who came running to his assistance and received from the appellant the stab wound from which he subsequently died.

The appellant's story was that he, Letchimi and Kalanjiam were seated in the room when P.W. 1 arrived with the deceased and another man came into the room. P.W. 1 spoke rudely to Letchimi and when Kalanjiam remonstrated with him he slapped Kalanjiam. The appellant himself protested at this and a fight ensued between P.W. 1 and the appellant in the course of which the appellant admits that he may have stabbed P.W. 1 with P.W. 1's own knife. The appellant said that the deceased, supported by the unnamed man, was engaged in a separate fight with Kalanjiam. Although the appellant did not expressly say so it is implicit in his statement that he had nothing to do with the stabbing of the deceased, who must have been stabbed either by Kalanjiam or by the unnamed man. In the appellant's version of the incident the fight took place in the court-yard.

The petition of appeal contains four grounds of appeal against conviction to which three further grounds were subsequently added. It will make for clarity if we follow the example of Mr. David Marshall, counsel for the appellant and deal with the additional grounds first.

The first of the additional grounds numbered (5) was that the learned trial judge erred in law in empanelling a special jury at the request of the Deputy Public Prosecutor without directing his mind to the justice or reasonableness thereof. The learned trial judge has recorded that the Deputy Public Prosecutor applied for a special jury and that Mr. Jag-Jit Singh, counsel for the defence at the trial, stated that he had no objection, whereupon the trial judge ordered that a special jury be empanelled. Section 190 of the Criminal Procedure Code which applies in Penang (S.S. Cap. 21) provides:

> "The Deputy Public Prosecutor or the accused may apply to any Judge of the High Court for an order requiring a special jury to be summoned to try any case before the Court and the Judge shall, if he considers such application just and reasonable, make such order accordingly."

We are of the opinion that it is not necessary for the trial judge to record his reasons for granting an application for a special jury and the fact that he gave defence counsel an opportunity of stating whether he had any objection or not shows that he did direct his mind to the question whether he should grant the application or not. The fact that he did grant it after being told that defence counsel had no objection implies that he must have considered it just and reasonable to do so, and we are unable to find any reason to criticise the exercise of his discretion.

The next additional ground numbered (6) was that the learned trial judge erred in law in hearing evidence in the absence of the jury on applications for impeachment of witnesses under section 124 of the Criminal Procedure Code. This ground relates to an application by defence counsel to set in motion the machinery provided by subsection (2) of that section in order to impeach the credit of P.W. 1, the first step being to ask the Court to refer to a statement made by the witness to a police officer in the course of the investigation. It also refers to a similar application by the Deputy Public Prosecutor in respect of the witness Inderani (D.W.3). In each case the learned trial judge asked the jury to retire while he referred to the statements and decided whether or not to permit them to be used for the purpose of impeaching the credit of the witnesses. In each case he conducted a careful inquiry into the making of the statements and as to whether the witnesses admitted having made them. P.W. 1 admitted making the statement and the judge ruled that it was sufficiently proved by the witness's own admission. The jury then returned to Court and the witness repeated his admission in their presence. In the case of D.W. 3 the witness, when a passage from her statement to the police was read out to her, said that she had been frightened and did not know what she had stated. The judge ruled that her statement must be proved. It was proved in the absence of the jury by the police officer who recorded it and the woman police inspector who interpreted it to him. When the judge was satisfied that it was a voluntary statement he recalled the jury and evidence of the circumstances in which the statement was made and recorded was repeated (though in a briefer form) by the two police officers concerned. We can find nothing to criticise in the procedure adopted by the learned trial judge and would only say that in our opinion he was both prudent and fair in the way in which he dealt with the matter.

The last of the additional grounds of appeal numbered (7) was that the learned trial judge had erred in law in failing to direct that the defence be supplied with copies of the statements made to the police by P.W. 1 and D.W. 3. It is not easy to see precisely what is intended in section 124(2) in this respect. Obviously the policy behind the provisions of the subsection is that where a witness gives evidence in Court which the prosecution knows or the defence either knows or suspects to be in conflict with a statement which he has previously made to the police, it is in the interests of justice that the judge should be made aware of the discrepancy so that the credibility of the witnesses may be tested by cross-examination, under which he will either explain, or fail to explain, the discrepancy to the satisfaction of the Court. As, however, it is unlikely that the whole of a witness's testimony

would be in conflict with the whole of his previous statement, the sub-section is usually invoked for the purpose of focussing attention on particular discrepancies. It is not immediately obvious why it should be necessary to provide the defence with anything more than a copy of the relevant passage in the statement which corresponds to the particular piece of evidence which they wish to attack, but it may be that the legislature feared that there might be some risk in limiting the right of the defence to receiving a copy of isolated passages taken out of context. At all events, they have used words which make it clear that the defence is entitled, if the Court thinks it expedient in the interests of justice that they should see any part of the statement, to be furnished with a copy of the whole statement. It follows that the furnishing of copies of extracts only from the statements of P.W. 1 and D.W. 3 was wrong. In our view, however, it could not have occasioned any possible miscarriage of justice in the present case and we would accordingly apply the proviso to section 29(1) of the Courts Ordinance, 1948.

The four original grounds of appeal against conviction were not strongly pressed by Mr. Marshall and we can find nothing in them which would cause us to interfere with the result of the trial. We do not propose to comment on grounds (3) and (4) but will deal shortly with grounds (1) and (2).

It was a somewhat unusual feature of this case that Letchimi and Kalanjiam, who on either version of the incident would appear to have been material witnesses, were not called by the prosecution. They were present and their presence was announced by the Deputy Public Prosecutor at the close of the prosecution so that the defence could have called them if they wished. The defence, of course, would have much preferred them to be offered for cross-examination but in our opinion the prosecution were under no duty to take this course and it was sufficient that they made known to the defence the availability of these witnesses if they required them. This seems to us to be well settled law. We do not think it necessary to resort to extensive quotation from the many authorities which were discussed by this Court in the case of *Khoon Chye Hin* v. *Public Prosecutor* [1]. It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witnesses who are available he runs the risk of having the presumption in illustration (g) to section 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as was said by Lord Thankerton in the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* [2], "that the prosecutor has been influenced by some oblique motive". The witnesses were freely offered to the defence and in our opinion the presumption did not arise. In our view the direction given by the trial judge on this point at page 94 of the record where he referred to the case of *Khoon Chye Hin* was adequate and unexceptionable.

The second of the original grounds of appeal is that the learned trial judge erred in law in not directing the jury on certain evidence given by P.W. 1 of conversations between himself and Letchimi and Kalanjiam which the trial judge, in the absence of the jury, had described as hearsay. Of course, if it was hearsay and if the judge thought it was hearsay he ought to have taken steps to expunge it from the minds of the jury. In our opinion, however, it was not hearsay at all, and was relevant, and it may be that the judge revised his earlier opinion before he came to sum up.

For these reasons we dismiss the appeal against the conviction.

In all the circumstances we are unable to say that a sentence of seven years' imprisonment is excessive and we dismiss the appeal against sentence also.

Appeal dismissed.

Solicitors: *David Marshall.*

FRANCIS v. MUNICIPAL COUNCILLORS OF KUALA LUMPUR

[P.C. (Lord Evershed, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva) October 3, 1962]

[Privy Council Appeal No. 8 of 1961]

Master and Servant — Wrongful dismissal — Right to declaration that servant was still employed — Municipal Ordinance, (S.S. Cap. 133), s.16.

The appellant entered the employment of the respondent Council in 1950 and in 1953 he was taken on to their permanent staff. By virtue of section 16 of the Municipal Ordinance the powers of appointment to and removal from office were vested in the President subject to the proviso that approval by the councillors was required. On October 1, 1957 the appellant was dismissed. The appellant then commenced the present proceedings. At the trial Ong J. dismissed his claim. On appeal the Court of Appeal in allowing the appeal awarded him damages amounting to three months' salary. The appellant in this appeal sought a declaration that the purported dismissal was *ultra vires* or null and void and that he continued to be and still continues to be employed by the respondents. There was also an alternative claim for damages for wrongful dismissal.

Held: where there had been a purported termination of a contract of service a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the courts would not grant specific performance of contracts of service. In this case as there were no special circumstances, the appellant's remedy lay in damages for wrongful dismissal.

Vine v. *National Dock Labour Board* [1] distinguished.

Case referred to:—

(1) *Vine* v. *National Dock Labour Board* [1956] 1 Q.B. 658, C.A.; [1957] A.C. 488; [1956] 3 All E.R. 939, H.L.

PRIVY COUNCIL APPEAL.

Dingle Foot, Q.C. (*T. O. Kellock* and *D. Taverne* with him) for the appellant.

J. T. Molony, Q.C. (*F. M. Drake* with him) for the respondents.